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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
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12 JOSE L. VALDEZ,

13 Petitioner,

14 v.

15 CALIFORNIA DEPARTMENT OF
16 CORRECTIONS AND REHABILITATION,

17 Respondent.

Civil No. 11cv2513-BEN (JMA)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

18 Petitioner, a state prisoner proceeding pro se, has filed a Petition for a Writ of Habeas
19 Corpus pursuant to 28 U.S.C. § 2254, but has failed to pay the \$5.00 filing fee and has failed to
20 move to proceed in forma pauperis. Because this Court cannot proceed until Petitioner has either
21 paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the
22 case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed
23 with this case, he must submit, **no later than January 3, 2012**, a copy of this Order with the
24 \$5.00 fee or with adequate proof of his inability to pay the fee.

25 In addition, Petitioner has failed to name a proper respondent. On federal habeas, a state
26 prisoner must name the state officer having custody of him as the respondent. Ortiz-Sandoval
27 v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254).
28 “Typically, that person is the warden of the facility in which the petitioner is incarcerated.” Id.

1 Federal courts lack personal jurisdiction over a habeas petition which has named an improper
2 respondent. See id.

3 The warden is the typical respondent. However, “the rules following section 2254 do not
4 specify the warden.” Id. “[T]he ‘state officer having custody’ may be ‘either the warden of the
5 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal
6 institutions.’” Id. (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a
7 petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall
8 be the state officer who has official custody of the petitioner (for example, the warden of the
9 prison).’” Id. (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

10 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]
11 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The
12 actual person who is [the] custodian [of the petitioner] must be the respondent.” Ashley v.
13 Washington, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of
14 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the
15 body” if directed to do so by the Court. “Both the warden of a California prison and the Director
16 of Corrections for California have the power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d
17 at 895.

18 Here, Petitioner has incorrectly named “California Department of Corrections and
19 Rehabilitation” as Respondent. In order for this Court to entertain the Petition filed in this
20 action, Petitioner must name the warden in charge of the state correctional facility in which he
21 is presently confined or the Director of the California Department of Corrections and
22 Rehabilitation. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

23 CONCLUSION AND ORDER

24 Based on the foregoing, the Court **DISMISSES** the Petition without prejudice due to
25 Petitioner’s failure to satisfy the filing fee requirement and failure to name a proper respondent.
26 To have this case reopened, Petitioner must satisfy the filing fee requirement and file a First
27 Amended Petition no later than **January 3, 2012** in conformance with this Order. The Clerk of
28 Court shall send a blank Southern District of California In Forma Pauperis Application and a

1 blank Southern District of California amended petition form to Petitioner along with a copy of
2 this Order.

3 **IT IS SO ORDERED.**

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5 **DATED: November 5, 2011**

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8 **Hon. Roger T. Benitez**
9 **United States District Judge**

10 CC: ALL PARTIES
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